UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:	)	
	)	
MPI	)	CASE NO. 02-11173
	)	
Debtor	)	

DECISION ON TRUSTEE'S OBJECTION TO ADMINISTRATIVE CLAIM

At Fort Wayne, Indiana, on September 29, 2005.

The debtor filed a petition for relief under Chapter 11 of the United States Bankruptcy Code on March 26, 2002. Shortly thereafter, the debtor filed an application seeking authority to employ the law firm of Ford, Marrin, Esposito, Witmeyer & Gleser, L.L.P. to represent it in connection with a product liability action that had been filed against it. This motion was subsequently granted. On November 19, 2003 the court confirmed a proposed plan. Among other things, the confirmed plan appointed a liquidating trustee, established a deadline of January 3, 2004 (thirty days after the effective date of the plan) for professionals to file administrative claims for their post petition services, and fixed the maximum amount for pre-2002 product liability claims against the estate at $50,000. For claims in excess of that amount, the claimant was free to proceed in state court for the purpose of recovering from any available insurance. On October 25, 2004, months after the deadline for doing so had passed, Ford Marrin filed an administrative claim seeking $25,948.80 representing the attorney fees and expenses incurred in connection with the litigation for which it had been employed. The liquidating trustee objected to this claim and the matter has been submitted to the court for a decision based upon stipulations of fact and the briefs of counsel.

The trustee's objection to Ford Marrin's administrative claim is three-fold. First, the trustee asks the court to completely deny it because it was late. Secondly, the trustee argues that the vast majority of the fees sought relate to services rendered post-confirmation and, since the trustee never

requested Ford Marrin to perform those services, the resulting fees are not the responsibility of the bankruptcy estate. Finally, the trustee argues that the services in question were not necessary and that the fees sought are not reasonable. The trustee is correct on all three points.

Ford Marrin does not and cannot dispute that its administrative claim was filed months late. Instead, it argues that, for one reason or another, the deadline for filing such claims should not apply to it and that, pursuant to Rule 9006 of the Federal Rules of Bankruptcy Procedure, the court should entertain the belated filing. Doing so is a matter committed to the court's discretion and, as an initial matter, requires the movant to demonstrate that the untimely filing "was the result of excusable neglect." Fed. R. Bankr. P. Rule 9006(b)(1). See, In re Herman's Sporting Goods, Inc., 166 B.R. 581, 583 (Bankr. D. N.J. 1994). While excusable neglect can certainly be found in carelessness and inadvertence, Pioneer Invest. Service Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 388, 113 S.Ct. 1489, 1494-95 (1993), one thing that does not constitute excusable neglect is "[a] deliberate, conscious decision." In re Celotex Corp., 232 B.R. 493, 496 (Bankr. M.D. Fla. 1999). See also, In re Montaldo Corp., 209 B.R. 40, 48 (Bankr. M.D. N.C. 1997); Agribank v. Green, 188 B.R. 982, 988 (Bankr. C.D. Ill. 1995); In re Sacred Heart Hosp. of Norristown, 186 B.R. 891, 895 (Bankr. E.D. Pa. 1995); In re Dauer, 165 B.R. 146, 148 (Bankr. D. N.J. 1994); In re New York Seven-Up Bottling Co., 153 B.R. 21, 22 (Bankr. S.D. N.Y. 1993); In re Eagle-Picher Indus., Inc., 158 B.R. 713, 716 (Bankr. S.D. Ohio 1993).

Ford Marrin argues that its failure to seek an administrative claim sooner constitutes excusable neglect, and was not an intentional decision, because it was not aware that it had such a claim until the debtor's insurance company, American Safety, refused to pay the bill and found other counsel to undertake the defense of the product liability case. But, what determines whether a decision was a conscious one is not so much whether the claimant knows it has a claim and

intentionally fails to file it, but rather whether the claimant weighs and considers the issues and the possibilities and makes a decision to pursue a particular course of action. See, In re Celotex Corp., 232 B.R. 493, 496 (Bankr. M.D. Fla. 1999); In re Bicoastal Corp., 176 B.R. 966 (Bankr. M.D. Fla. 1994)(creditor's decision not to file a claim because it expected payment from another source was a deliberate, conscious decision). See also, Matter of Mother Hubbard, Inc., 152 B.R. 189, 193-94 (Bankr. W.D. Mich. 1993). That is exactly what happened here. Ford Marrin knew that it had rendered services to the debtor following the petition and knew that it had not been paid for those services. Despite this, it did not file a timely administrative claim not because it was unaware of the deadline or of the need to do so, but because it did not care about any such deadline.[1] It never expected to have to look to the bankruptcy estate to pay its fees because it was expecting payment to come from the debtor's insurance carrier – so court-imposed deadlines would not matter. It was only after the carrier refused to pay the bill that Ford Marrin began looking for another pocket. By that time, it was too late to look to the estate. Ford Marrin made a conscious decision to rely upon the debtor's insurance carrier to pay its fees and expenses and not to pursue the estate. Thus, the failure to file a timely administrative claim was not the product of excusable neglect. Accord, Bicoastal Corp., 176 B.R. at 971.

If Ford Marrin had filed a timely administrative claim, that claim would have looked far different from the one it actually submitted. Of the fees and expenses it has asked the estate to pay,

[1]Ford Marrin argues that it was not served with a copy of the plan containing the deadline for administrative claims and thus did not receive the process it was due. Yet, Ford Marrin was fully aware of the bankruptcy, knew that it had been employed by the debtor, had rendered services for which it had not been paid, and was served with a copy of the court's notice that a plan had been confirmed. As a sophisticated law firm it must have some understanding of the importance and the potential impact of confirmation upon those that may have claims against the estate and, given its knowledge of the case, was charged with a duty to make some effort to inquire into the consequences of such a significant event.

less than six percent of the total – $1,530 – predate confirmation; the remaining $24,418.80 arise after confirmation of the plan. This leads to the trustee's second challenge to the application. Without regard to the reasonableness of Ford Marrin's requested fees, the trustee never asked it to perform any post-confirmation services, and so the trustee argues the responsibility for paying the bill should not be the estate's. The argument is a good one. Post-confirmation debts are not liabilities of the Chapter 11 bankruptcy estate. In re Sure-Snap Corp., 983 F.2d 1015, 1018 (11th Cir. 1993); In re Nuttall Equipment Co, Inc., 188 B.R. 732 (Bankr. W.D. N.Y. 1995). The stipulated facts do not reveal why Ford Marrin proceeded to do such a substantial amount of work following confirmation or with whom it may have consulted before doing so. We know only that it was not the liquidating trustee and, unless those services were undertaken at the trustee's behest, the court can think of no reason why the estate should have to pay for them.

The trustee's final challenge to Ford Marrin's application relates to the necessity of the services it rendered and the reasonableness of the fees sought. The trustee argues that, from the estate's perspective, Ford Marrin's services – particularly its post confirmation services – were not necessary and that the fees it seeks are not reasonable. See, 11 U.S.C. § 330(a)(court may allow "reasonable compensation for actual, necessary services"). To begin with, the plaintiffs in the product liability action to which Ford Marrin's fees relate never filed a proof of claim in the bankruptcy case, and therefore had no claim against the estate. Matter of Greenig, 152 F.3d 631 (7th Cir. 1998). In the absence of a claim against the estate, the estate would have no need to defend that action and no need for Ford Marrin's services. Even if the plaintiffs in the product liability suit had filed a timely proof of claim, there would be no need to for those services unless the claim had been objected to, 11 U.S.C. § 502(a), and the confirmed plan's limitation on the amount of product liability claims would obviate the need for such an objection and, once again, Ford Marrin's services.

Given that the estate had no need to defend against the product liability claim, Ford Marrin's post-confirmation services doing so were not necessary and cannot be compensated.

The only portion of Ford Marrin's services that might possibly have been necessary are those rendered prior to confirmation, which amount to $1,530 of counsel's time, and Ford Marrin argues that its application should at least be allowed in that amount. The argument overlooks the fact "that an otherwise meritorious request may be denied in toto because the amount sought is excessive . . . ." Matter of Pierce, 165 B.R. 252, 255 (Bankr. N.D. Ind 1994). Thus, even if the reasonable value of Ford Marrin's necessary services was $1,530, the court can properly deny those fees because they are buried in a claim requesting more that sixteen times that amount. Furthermore, even those fees may not be reasonable or necessary given what little Ford Marrin actually needed to do to protect the estate prior to confirmation. The automatic stay of § 362 prevented the non-bankruptcy litigation from proceeding without the permission of this court. All Ford Marrin should have had to do to bring that action to a halt was file a notice of the bankruptcy and the automatic stay with the state court, and then await further instructions. This should have required only a minimal amount of time. Instead, the estate is being billed for almost seven hours of time at over $200 per hour, without any explanation of why all this was necessary. "The applicant cannot safely operate on the proposition that it can ask for the moon and stars and leave it to the court to determine what, if any, portion of its request might represent a reasonable fee." Pierce, 165 B.R. at 255. See also, Brown v. Stackler, 612 F.2d 1057, 1059 (7th Cir. 1980).

Ford Marrin's claim for an administrative expense will be denied. An order doing so will be entered.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court